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No. 82-260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMY FRANCES ELLIS, CYRIL VICTOR FRAZIER, AND ZELLA FERN FRAZIER,
Petitioners,

v.

JUDGE OF THE PUTNAM CIRCUIT COURT, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ISSUES PRESENTED FOR REVIEW

The Respondents agree with the Petitioners' Issues Presented for Review as set forth on the first page of their Petition except that the Respondents do not agree with that portion of paragraph 3 of the Petitioners' Issues Presented for Review that refers to the Petitioners as *de facto* parents.

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JURISDICTION

The Respondents agree with the jurisdictional statement contained in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Respondents agree with the partial references by the Petitioners to the First and Fourteenth Amendment on page 2 of the Petition and to the provisions of 42 U.S.C.A. §1983.

STATEMENT OF THE CASE

Early in November of 1975, Judge Francis N. Hamilton of the Putnam Circuit Court received a phone call from the petitioner Amy Frances Ellis complaining about the fact

that her adopted son, Larry Donovan Ellis, and his wife were mistreating their four children, were leaving them alone and unattended for extended periods of time without sufficient food in the home and that said home was being maintained in a filthy and unhealthy state for such children. Judge Hamilton at that time directed the Putnam County Department of Public Welfare to conduct an investigation of the home and to maintain continuing supervision to determine whether or not the parents' conduct constituted a threat to the health and well-being of the four minor children.

Judge Hamilton also requested that the Office of the Prosecuting Attorney of Putnam County cooperate with the Department of Public Welfare, if in the opinion of such Department, prosecution would be warranted.

On March 19, 1976, the Prosecuting Attorney filed in the Putnam Circuit Court Criminal Cause No. CR 76-58 entitled "State of Indiana v. Larry Ellis and Mary Ellis". The affidavit was accompanied by a probable cause affidavit and after examining the probable cause affidavit and hearing evidence and after being duly advised in the premises, Judge Hamilton found that probable cause existed for the issuance of a warrant for the defendants Larry Ellis and Mary Ellis and such warrants were issued to the Sheriff of Putnam County, Indiana. (R. P. Affidavit of respondent Francis N. Hamilton, Judge of Putnam Circuit Court, pp. 111-116)

On March 22, 1976, Larry Ellis and Mary Ellis were brought into the Putnam Circuit Court and were advised fully as to their constitutional rights. At that time, they each voluntarily entered a plea of not guilty to the charge of cruelty and neglect to children and agreed to proceed with the trial of the cause. Larry Ellis stated to the Court that he would serve as his own counsel. The primary witness for the State of Indiana was Amy Frances Ellis, one of the Petitioners herein, and she testified at great length as to the

abuse of the children by their parents in her home over an extended period of time. The evidence disclosed that since January of 1976, Larry Donovan Ellis and his wife Mary had been residing in the home of petitioner Amy Frances Ellis with their four children and much of the observations testified to by the petitioner Amy Frances Ellis were observations made during the period of time that they were residents of her own home.

At the conclusion of the evidence, Judge Hamilton took the matter under advisement for sentencing. He ordered that the four children be made wards of the Putnam County Department of Public Welfare and that the Department of Public Welfare find suitable homes for the children and to expend such funds as may be necessary to provide for their care and maintenance and supervision and education. He ordered the two defendants to pay into the Office of the Clerk of the Putnam Circuit Court the sum of Sixty Dollars ($60) on each Friday thereafter for the support and maintenance of such children. Further, Judge Hamilton ordered the defendants Larry Ellis and Mary Ellis to remove their items of personal property from the home of the petitioner Amy Frances Ellis and had a police officer from the City of Greencastle accompany them to the home for that purpose and ordered them to remain away from the home of Amy Frances Ellis and not be around said home at any time. He further ordered them to furnish the Putnam County Department of Public Welfare with an address where they could be reached and directed the Putnam County Department of Public Welfare to furnish to the Court a home study of the home of Larry and Mary Ellis. The defendants were released on their own recognizance.

On July 8, 1977, the Putnam County Department of Public Welfare appeared in Judge Hamilton's Court with Larry Ellis and reported to the Court that on June 25, 1976, the Putnam County Department of Public Welfare had temporarily returned the children to the home of their

parents, Larry and Mary Ellis. Further, Larry Ellis advised the Court that his wife and the natural mother of the children had abandoned their home on July 7, 1977, and he specifically requested that the Court place Ann, age 6, and Larry, age 6, in the home of Zella Frazier and Twila, age 9, and Dawn, age 4 in the home of Amy Frances Ellis. At that time, Judge Hamilton ordered Larry Ellis to pay into the Office of the Clerk of the Putnam Circuit Court the sum of Eighty Dollars ($80) on each Friday thereafter for the support and maintenance of the minor children plus all reasonable and necessary medical, dental, optical, hospital, pharmaceutical expenses and support payments were ordered to be made also to Zella Frazier.

On August 18, 1977, the Putnam County Department of Public Welfare informed Judge Hamilton that the children had been placed in the Ladoga Christian Home and at that time, he ordered all support payments made payable to the Indiana Department of Public Welfare pursuant to Title IV-D Assignment.

On June 5, 1978, respondent Juanita Brooks, Child Welfare Worker for the Putnam County Department of Public Welfare, filed in the Putnam Juvenile Court her Petition to Terminate Parental Rights of Larry Ellis and Mary Ellis together with a non-resident affidavit. At that time, the whereabouts of both Larry Ellis and Mary Ellis were unknown and it was felt that they had removed themselves from the jurisdiction of the Court. Judge Hamilton ordered notice by publication and set the petition for hearing for June 30, 1978 at 9:00 A.M. Notice was published pursuant to Indiana law in the *Banner-Graphic*, a newspaper of general circulation in Putnam County, Indiana, with publications being had on June 12, 19 and 26, 1978.

Prior to the filing of such petition, attorney Judith T. Kirtland came to Judge Hamilton's office on May 31, 1978 and advised Judge Hamilton that she was representing

Amy Frances Ellis and Zella Fern Frazier. Judge Hamilton discussed with her the fact that the Putnam County Department of Public Welfare was going to file a Petition to Terminate Parental Rights as a preliminary matter to the adoption of the four Ellis children.

After filing of the petition as set forth above, Judge Hamilton had a further conversation with attorney Kirtland and she was informed that the petition was set for hearing on June 30, 1978. At that time, attorney Kirtland stated that she would inform Mrs. Ellis and Mrs. Frazier and that she and they would in all likelihood attend the hearing.

Neither Mrs. Kirtland nor Mrs. Ellis nor Mrs. Frazier attended the hearing; although Mrs. Ellis did call Judge Hamilton while the Petition to Terminate Parental Rights was pending and he did discuss the matter with her and again specifically informed her as to the time and date of the hearing. The petitioner Amy Frances Ellis stated to Judge Hamilton that she wanted the children to have a good home and that she hoped that she would be able to visit with the children. Judge Hamilton responded that that would be up to the adoptive parents.

Subsequent to the termination of parental rights, an adoption petition was presented to the Clerk of the Putnam Circuit Court on behalf of Amy Frances Ellis and Cyril Victor Frazier and Zella Fern Frazier seeking to adopt the four Ellis children. The petition was deficient in many ways and did not comply with the rules of the Court nor in Judge Hamilton's opinion, with the laws of the State of Indiana. Further, the attempt to file an adoption petition in the Office of the Clerk of the Putnam Circuit Court was violative of a long-standing rule of the Court which has always required adoption petitions to be filed in the Office of the Court Reporter on the third floor of the Putnam County Courthouse where said petitions are maintained away from the public records of the Clerk's Office so as to maintain and protect their confidentiality.

The day following the filing of such petition, Judge Hamilton called attorney Kirtland in her capacity as the petitioner's counsel and informed her that contrary to the rules of the Court, she had included all four children on one adoption petition and that she would have to file separate petitions for each child.

Further Judge Hamilton informed attorney Kirtland that her petition did not set forth all of the elements required to be found by the Court so as to enable the application to be made for a new birth certificate for the children. Judge Hamilton further informed attorney Kirtland that she had not accompanied her petition with any consents from the Putnam County Department of Public Welfare. He again informed attorney Kirtland that an adoption petition must be filed in the Court Reporter's Office and not in the Clerk's Office.

At the time such petition was filed on behalf of Mrs. Ellis and the Fraziers, the children were wards of the Welfare Department of Putnam County and the petitioner would have to have obtained the consent of the Welfare Department to the adoption of such children by the petitioners. He subsequently learned that the Welfare Department had already executed consents for the other adoptive parents to adopt each of the four children.

Subsequently, pursuant to the Order of the District Court, the Respondents filed a Motion for Summary Judgment accompanied by supporting affidavits.

The affidavits filed in opposition to the Motion for Summary Judgment were not filed until the morning that the Court had set for the hearing at 9:00 A.M. on October 27, 1981, (R. P., p. 275). The Respondents had had no opportunity to see or read the affidavits and while they made no objections to such affidavits, they were given thirty days to file additional pleadings, but having had an opportunity to examine the affidvits filed in opposition to the Motion for Summary Judgment, it was concluded by

Respondents' counsel that the facts contained in said affidavits were not germane to the issues raised by the Respondents' Motion for Summary Judgment, that being the standing of the Petitioners to bring the cause of action itself. While it does not appear in the Record, counsel for the Respondents so informed the Court and asked the Court to rule on the pending Motion for Summary Judgment.

Attorney Kirtland admits to having no personal knowledge of the previous attitudes of the Petitioners regarding their desires to have the Ellis children, but stated that at the time of her visit with the respondent Francis N. Hamilton in May of 1978, the Petitioners then decided that they wanted the children. (R. P., p. 169)

After admitting that she had been told on July 18, 1978 that all adoption petitions had to be filed with the Judge's Office and not with the Clerk's Office (R. P., p. 170), attorney Kirtland again on August 24, 1978, submitted her petition to the Clerk's Office with her cover letter of August 24, 1978. (R. P., p. 195)

Further, after being advised as to what the contents of the adoption petition should include (R. P., p. 172, ¶14 of Judith Kirtland's Affidavit in Opposition to Motion for Summary Judgment), attorney Kirtland subsequently ignored such directives from the Court and failed to include that information in the four adoption petitions she presented on July 18, 1978 (R. P., Petition Re: Larry Donovan Ellis, p. 182; Petition Re: Delta Dawn Ellis, p. 184; Petition Re: Twila Gail Ellis, p. 186; Petition Re: Kimberly Ann Ellis, p. 188).

The petitioner Ellis admits that she initiated the complaint that first resulted in the children being made wards of the Welfare Department on March 19, 1976, and that she was the principal State's witness against her adopted son and daughter-in-law at the criminal hearing held around March 22, 1976, in the Putnam Circuit Court (R. P., p. 208).

Petitioner Zella Fern Frazier admits being present at a hearing on March 22, 1976, in response to the complaints of petitioner Amy Frances Ellis and was present when the children were made wards of the Putnam County Department of Public Welfare. (R. P., p. 236)

The petitioner Cyril Victor Frazier admits knowing of the date of the hearing when the children were made wards of the Putnam County Department of Public Welfare, but denies being present at such hearing. (R. P., p. 248)

The petitioner Amy Frances Ellis was 72 years of age at the time this case was argued before the Seventh Circuit Court of Appeals based upon information set out in her petition to adopt two of the children. (R. P., Petition Re: Delta Dawn Ellis, p. 184; Petition Re: Twila Gail Ellis, p. 186)

Zella Frazier and Cyril Frazier, based upon the petition for adoptions filed on their behalf, was at the time of the argument of this case before the Seventh Circuit Court of Appeals, 58 or 59 years old and 69 or 70 years old respectively. (R. P., Petition Re: Kimberly Ellis, p. 188)

In their complaint which initiated these proceedings in the District Court, the Petitioners correctly stated that the petitioner Zella Frazier was the natural mother of Larry Ellis, the natural father of the four children in question, that she placed him for adoption in 1952 and that he was adopted by the petitioner Amy Frances Ellis.

The petitioner Cyril Frazier did not come on the scene until his marriage to Zella Frazier on January 5, 1969, some 17 years after Zella Frazier had given up her rights to her natural son Larry Ellis. (R. P., Petition Re: Kimberly Ellis, p. 188)

REASONS FOR NOT GRANTING THE PETITION

In this argument section, the Respondents will repeat the reason given by the Petitioners in support of the granting of

this petition and follow each one by Respondents' argument.

A. The Court of Appeals' Decision Creates a Rigid and Simplistic Rule for Deciding Whether Due Process Has Been Satisfied and is Therefore Contrary to this Court's Holding in *Matthews v. Eldridge*.

The Petitioners' position under this portion of their argument stands or falls upon this Court's interpretation of the case of *Matthews v. Eldridge*, 424 U.S. 319 (1976).

A careful reading of this case clearly shows that it involves a federal administrative proceeding brought under 42 U.S.C. §405(g) involving the appeal of a determination removing the plaintiff from Social Security disability benefits. Involving a federal administrative proceeding not in any way related to an action brought under 42 U.S.C. §1983, *Matthews v. Eldridge* must be confined to its narrow application and certainly not expanded to the instant case.

The Petitioners criticize the United States Court of Appeals for the Seventh Circuit by stating that in relying upon *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Ingraham v. Wright*, 430 U.S. 651 (1977), they have thus created an inflexible rule which obviates the need for the balancing test articulated in *Matthews v. Eldridge, supra.*

Such is simply not the case. In fact, the Court in *Ingraham* acknowledges and restates the balancing test referred to in *Matthews* and reaches the same result that the United States Court of Appeals for the Seventh Circuit reached in this case. *Ingraham v. Wright, supra*, p. 675. Among the cases cited under this section of the Petitioners' argument are the cases of *Stanley v. Illinois*, 405 U.S. 645 (1972) and *Duchesne v. Sugarman*, 566 F.2d 817 (2nd Cir. 1977). They cite *Stanley v. Illinois* correctly for the proposition that parents are constitutionally entitled to a hearing on their fitness before their children are removed

from their custody. *Stanley* involves an Illinois law which did not include in the definition of parent an unwed father of an illegitimate child. In that case, the plaintiff had lived out of wedlock with the mother of the three children involved for 18 years and the children were born during that period of time. Upon the mother's death, under Illinois law, it was necessary to appoint a guardian for the children and they were removed from the plaintiff since he was not legally defined as a parent. One certainly cannot argue with the outcome in *Stanley* nor can one apply any of the principles of law in *Stanley* to the issues of the instant case. *Duchesne* can be distinguished as easily because it is an action brought by a natural mother.

The Petitioners continuously throughout this section of their petition bemoan the fact that they received no notice of the various judicial proceedings presumably including the criminal proceedings where the natural mother and father of these children were found to be guilty of child neglect, the subsequent proceedings to terminate the parental rights of the natural mother and father and the subsequent adoption proceedings of the four children by other parties.

Such is simply factually incorrect as to the first two hearings and in regard to those two hearings, the facts are not in dispute. The petitioner Amy Frances Ellis is the one who initiated the criminal proceedings against the natural mother and father of these children after she observed the children being abused over a long period of time while they were residing in her home with the parents. She was the State's key witness in the trial that resulted in their conviction.

It is again without conflict that an attorney by the name of Judith Kirtland, representing at that time Zella Frazier and Amy Frances Ellis, was specifically informed of the date and time of the hearing to terminate parental rights and was or, as an Indiana practitioner, certainly should

have been aware of the fact that that was a matter preliminary to adoption proceedings and Amy Frances Ellis herself was again advised of the specific date and time on the telephone by the respondent Judge Francis N. Hamilton. Neither Ms. Kirtland nor her two clients appeared at the hearing.

It is also without dispute that none of the Petitioners received any notice of the adoption proceedings whereby the four children were adopted by four separate families.

During the course of argument before the United States Court of Appeals for the Seventh Circuit, counsel for the Respondents was asked whether or not he knew of any adoption laws of any state requiring notice to grandparents or to persons who had supposedly developed warm and loving relationships with the children sought to be adopted. No such authority in any state has been found either through legislation or common law. The only notice requirements regard notice to the natural parents and that was provided in this case through publication since both natural parents, at the time of the adoptions, had left the state and their whereabouts were unknown. There is no allegation by the Petitioners of any impropriety or the violation of any Indiana law in regard to the adoption proceedings themselves and the way with which the natural parents were dealt.

It is obvious that the Respondent Judge met his judicial duty as outlined by Indiana law when he weighed and considered the interest of the absconding natural parents with that of the potential adoptive parents and balanced those interests against the child's best interest which he permitted to rule supreme. *Matter of Adoption of Hewitt*, ___ Ind. App. ___, 396 N.E.2d 938 (1979)

B. The Court of Appeals' Decision Requiring Petitioners to Exhaust Their State Judicial Remedies Conflicts with the Principles of *Patsy v. Florida Board of Regents*.

In this section of their argument, the Petitioners face the arduous task of convincing this Court that the opinion of the United States Court of Appeals for the Seventh Circuit decided this case on the basis that the Petitioners had not exhausted their state judicial remedies. A reading of the opinion of the United States Court of Appeals for the Seventh Circuit shows this simply not to be the case. The following language is found on page A-12 in the Appendix of the Petition:

> "We do not say that a section 1983 plaintiff must exhaust his state remedies before he can proceed in federal court. That would imply that if the plaintiffs here had assiduously but unsuccessfully pursued their remedies under Indiana law we could not reject their federal claims without a trial. The point, rather, is that there is no denial of due process if the state provides reasonable remedies for preventing families from being arbitrarily broken up by local domestic relations officers such as the defendants in this case. The courts of Indiana seem every bit as determined to prevent such wrongs as the federal courts would be. See *Matter of Adoption of Hewitt*, 396 N.E.2d 938 (Ind. App. 1979); *Matter of Joseph*, 416 N.E.2d 857 (Ind. App. 1981). Indeed, despite their dilatoriness, the plaintiffs in the present case still have remedies they can pursue under Indiana law. A motion by the plaintiffs to supplement the record on appeal advises us that in November of last year, the Putnam County welfare board filed a petition in the county court charging the adoptive parents of one of the plaintiffs' grandchildren with abuse and neglect of the child. The Fraziers have moved to intervene in the case and their motion is pending before that court. They have also moved the court, successfully, to order the child

> examined by a competent psychiatrist. These developments deepen our sympathy for their unfortunate family and bolster the plaintiffs' contention that the defendants have mishandled the whole business. But they also show that the plaintiffs really did, and still do, have remedies under Indiana law.
>
> The approach we take here, which considers the adequacy and availability *(not exhaustion)* of remedies under state law before concluding that a deprivation of life, liberty, or property violates due process of law, is not a novelty in either property cases, see *Parratt v. Taylor*, 451 U.S. 527 (1981), or Liberty cases, see *Ingraham v. Wright*, 430 U.S. 651, 676-82 (1977)..."

Apparently the Petitioners have attempted to tailor their interpretation of the opinion of the United States Court of Appeals for the Seventh Circuit so as to bring it within the purview of the recent Supreme Court case of *Patsy v. Board of Regents of the State of Florida*, No. 80-1874, decided June 22, 1982.

The fact that *Patsy* does not apply to the instant case is made abundantly clear by the first sentence of the case, which reads as follows:

> "This case presents the question whether exhaustion of state administrative remedies is a prerequisite to an action under 42 U.S.C. §1983."

This Court correctly observed that it has stated categorically that exhaustion is not a prerequisite to an action under 1983, and that the Court has not deviated from that position in 19 years. The Court then held that it was not addressing this question as one of first impression.

It is significant to note that during this 19-year history, this Court also decided the cases *Parratt v. Taylor* (1981 *supra*) and *Ingraham v. Wright* (1977 *supra*). In *Parratt*, an inmate was suing a state official in the State of Nebraska because certain materials he had ordered had been

delivered in the mail and were lost because prescribed state procedures had not been followed. This Court first found that the plaintiff did have a property right which qualified him to bring a 1983 action against the state official. In its opinion, this Court acknowledged the apparent confusion of the lower courts on this issue and stated:

> "We, therefore, once more put our shoulder to the wheel hoping to be of greater assistance to courts confronting such a fact situation than it appears we have been in the past." *Parratt v. Taylor, supra*, p. 533.

The Court then, observing that they must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivation satisfied the requirements of procedural due process went on to find that the State of Nebraska did in fact have a tort claims procedure which provided a remedy to persons who suffer tortious losses at the hands of the state.

Also, in his concurring opinion, Justice Stewart stated:

> "But even if Nebraska has deprived the respondent of his property in the constitutional sense, it has not deprived him of it without due process of law. By making available to the respondent a reparations remedy, Nebraska has done all that the Fourteenth Amendment requires in this context." *Parratt v. Taylor, supra*, p. 545.

As stated above, during this same 19-year history, this Court decided the case of *Ingraham v. Wright, supra*. This involved an action brought under §1983 by the parents of two students in the Dade County Florida Junior High School resulting from injuries sustained by them during the course of the administration of corporal punishment by school officials.

In its opinion, this Court stated:

> "The Fourteenth Amendment prohibits any state deprivation of life, liberty or property without due

> process of law. Application of this prohibition requires the familiar two-stage analysis: We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment protection of 'life, liberty or property'; if protected interests are implicated, we then must decide what procedures constitute 'due process of law'. (underscoring added) Citing *Morrissey v. Brewer*, 408 U.S. 481, 33 L.Ed.2d 484, 92 S.Ct. 2593; *Board of Regents v. Roth*, 408 U.S. 564, 569-572, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972)" *Ingraham v. Wright, supra*, p. 672.

After deciding that corporal punishment in a public school did involve an interest encompassed within the Fourteenth Amendment protection of life, liberty and property, the Court then turned to the second test and found that the State of Florida provided adequate due process for children abused through unreasonably severe corporal punishment.

This Court then concluded that:

> "The Fourteenth Amendment's requirement of procedural due process is satisfied by Florida's preservation of common law constraints and remedies." *Ingraham v. Wright, supra*, p. 683. See also *Allen v. McCurry*, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980).

Thus, the United States Court of Appeals for the Seventh Circuit did not, as asserted by the Petitioners, decide this case on the basis that the Petitioners had not exhausted their state remedies, but rather on the basis that the State of Indiana provided numerous remedies set out in the opinion of the Court, which satisfied the Fourteenth Amendment's requirements. The Court very carefully followed the history of the treatment of this area by this Court.

The *Patsy* opinion is distinguishable not only because it involves solely an appeal from an state administrative

proceeding and should be confined to such instances, but also it must be considered that the *Patsy* case involved a suit by a disgruntled employee engaged in administrative proceedings against her employer and claiming lack of promotion based upon sex discrimination while the instant case is a domestic relations matter involving the custody, family relationship and stability of the lives of four minor children. Such cases should not be decided on the same basis as the facts in *Patsy* or other cases involving criminals attempting to get out of prison through habeas corpus proceedings or suing the police officers who arrested them. The standards by which the facts in the instant case should be judged are best set out in the case of *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978).

This Court in *Patsy* conducted an extensive study of the legislative history of §1983 observing that it was a part of the 1871 Civil Rights Act. At page 8 of the opinion, the court observes as follows:

> "A major factor motivating the expansion of federal court jurisdiction through Sections 1 and 2 of the Bill was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." *Patsy v. Board of Regents of the State of Florida, supra.*

The Respondents do not urge this Court to abandon its position that administrative remedies need not be exhausted prior to pursuing 1983 rights. The Respondents do respectfully request that this Court recognize that, based upon this Court's own authority, the Seventh Circuit did find not an exhaustion of remedies problem, but that the State of Indiana provides the Petitioners with adequate remedies which satisfy the due process requirements of the Fourteenth Amendment and, as stated in the opinion of the Court, the state exhibits a desire to protect this right equal to that of the federal courts.

C. This Case Presents an Opportunity to Determine Whether Relatives Acting as Long-Term *De Facto* Parents Have a Constitutionally Protected Liberty Interest in Maintaining the Integrity of Their Families

The Respondents strongly disagree with the characterization of the Petitioners as "relatives acting as long-term *de facto* parents" and question the Petitioners' authority cited in support of this third argument.

For example, the Petitioners cite the case of *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). This case involves litigation brought by two female school teachers against their Board of Education challenging a rule of the Board requiring pregnant teachers to commence maternity leave five months before the delivery date of their children and to give notice at least two weeks prior to that. The leave was without pay and the policy provided that the teachers could not become eligible for re-employment until the beginning of the next school semester following their child attaining the age of three months. Petitioners' quote from page 20 of their Petition, which states:

> "This Court has long recognized that 'freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'"

constitutes six lines in a 20-page opinion that in no way is related to the facts of this case or to this third issue raised by the Petitioners. The Court found in *Cleveland Board of Education v. LaFleur* that the mandatory termination provision was in fact unconstitutional, but again that has no application to the issues before the Court in this Petition.

It is also interesting to note that Petitioners also have cited the case of *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) for the proposition that there is a "private realm of family life which the state cannot enter". In *Prince*, an aunt

who was also custodian of her niece was appealing her conviction under a Massachusetts child labor law prohibiting children under a certain age from selling or exercising any trade in any street or public place in the State of Massachusetts. The statute imposed a penalty on anyone who encouraged children to engage in such conduct. The aunt and her niece were distributing and selling religious material at night time on a public street and the aunt was convicted by the Massachusetts state court. Upon reviewing the case, this Court stated:

> "It is the interest of youth itself and of the whole community that childen be both safeguarded from abuses and given opportunities for growth into free and independent, well-developed men and citizens." *Prince v. Massachusetts, supra*, p. 165.
>
> "but the family itself is not beyond regulation in the public interests." *Prince v. Massachusetts, supra*, p. 166
>
> and
>
> "The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction."

The Court in *Prince* then went on to uphold the constitutionality of the Massachusetts child labor law and the conviction of the aunt for violating it and thus, *Prince* is far more supportive of the Respondents' position than it is of the Petitioners'.

Among other cases relied upon by the Petitioners is *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), which was a case where this Court struck down as unconstitutional an East Cleveland ordinance which prohibited grandparents from living with their grandchildren. Again there is no connection between *Moore* and the instant case.

It is clear from the facts as alleged in Petitioners' Petition that Amy Frances Ellis became the adoptive mother of Larry Donovan Ellis in 1952. It is equally clear that any parental right that Zella Fern Frazier or Cyril Victor Frazier through her, may have had in Larry Donovan Ellis were terminated in 1952. A decree of adoption severs forever every part of the parent-child relationship. In such an instance, the parent loses the right to see or visit with the child or to even have any knowledge of his whereabouts. *Bristow v. Konopka*, 166 Ind. App. 357, 336 N.E.2d 397 (1975).

For all legal and practical purposes, an adopted child is the same as dead to its parents. *In Re The Adoption of Bryant*, 134 Ind. App. 480, 189 N.E.2d 593 (1963); also see, IND. CODE 31-3-1-9 (1976). Thus, any right of the petitioner Zella Fern Frazier to a relationship with any offspring of Larry Donovan Ellis or with Larry Donovan Ellis himself terminated in 1952 at the time of his adoption by Amy Frances Ellis.

If the effect of the adoption is to sever the child completely from its natual family and graft it on to the adoptive family, then the relationship between the child and all members of its natural family must be severed, not just between the child and its natural parents. Thus, the lawful adoption of the four Ellis children as described in the Affidavits in support of the Respondents' Motion for Summary Judgment severed any legal relationship between the petitioner Amy Frances Ellis and such children. This logic is supported by the Indiana Court of Appeals in an opinion handed down in a case entitled *In Re Kenny's Estate*, 129 Ind. App. 199, 153 N.E.2d 607 (1958); transfer denied 129 Ind. App. 199, 239 Ind. 142, 155 N.E.2d 389.

In *Kenny*, a granddaughter, who had been adopted as a minor, attempted to inherit from the natural paternal grandfather who died intestate subsequent to the adoption.

After referring to the applicable statute on page 611 of the opinion, the Court states as follows:

> "It seems clear from the language employed by the legislature in said sub-section, and in the manner of statement thereof, that for the purposes of intestate succession, the blood line between a child adopted during its minority and its natural relative is completely severed, except under the conditions found in the proviso to said sub-section. First, the sub-section contains a positive mandate that the adopted child *shall be treated as the natural child* of the adopters; and second, it contains an equally positive desist against treating the adopted child as the child of its natural parents. The word 'treated', as here used, seems to be synonymous with such words as 'considered', regarded', 'dealt with', etc.
>
> The statute, as drawn and worded, leaves no discernible opening for conditional interpretation. In effect, it provides that when a minor child is adopted, it is no longer the child of or in the blood line of its natural parents for the purpose of any possibility of intestate inheritance. The natural ties of affection and interest between the adopted minor child and its blood relatives are not and, of course, cannot be affected by this statute. But for the purpose of intestate succession, the child is freed from his former blood relationship status and is established in a new status as a member of a new family with full standing as one of its blood. Other than the conditions provided in the proviso to said sub-section and the fact that the child must be 'legally' adopted, no observable way to avoid the declared status of the minor adopted child is found." *In Re Kenny's Estate, supra,* pp. 611-2 (emphasis in original quoting material)

In this instance, the Respondents complied completely with Indiana law.

In their Memorandum, in their Pre-Trial Brief and Memorandum of Law filed with their original complaint,

the Petitioners relied almost solely upon four cases to support their contention that the Petitioners have a right to participate in the nurturing and development of their grandchildren now adopted out to other adoptive parents. These are the cases of *Drollinger v. Milligan*, 552 F.2d 1220 (7th Cir. 1977); the case of *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 396, 28 L.Ed.2d 113 (1971); *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1976); and *Moore v. The City of East Cleveland*, 431 U.S. 494, 97 S.Ct. ____, 52 L.Ed.2d 531 (1977) (previously distinguished).

The *Boddie* case involved female welfare recipients who brought a class action and were successful in striking down a Connecticut state law requiring them to pay filing fees and court costs before they could get their divorces as being an unconstitutional denial of due process to indigent persons. *Bodie v. Connecticut, supra.*

Procunier strikes down a mail censorship regulation in a California state prison as being violative of the First Amendment. *Procunier v. Martinez, supra.*

Drollinger is a case involving a challenge by a child's mother and the child's paternal grandfather to the terms of probation set down by the Montgomery County, Indiana Circuit Court as a result of the criminal conviction of the child's mother. In essence, the complaint centered around the fact that the terms of probation would deprive the paternal grandfather of the right to visit with his grandchild. In *Drollinger*, there was no adoption involved and the action of the Montgomery County, Indiana Circuit Court did in fact deprive the actual grandfather of such visitation rights with the child who was still his natural grandchild. The attempt of the Petitioners to expand *Drollinger* to the facts of this case is unwarranted and would if supported by this Court, truly open a Pandora's box that would totally destroy the adoption process in this and other states.

If *Drollinger* could be expanded so as to permit a grandparent to set aside an otherwise legal adoption for the reason that it deprived her of the right to consortium and a relationship with her grandchildren (when such right was terminated by the very adoption she is challenging), then we could also look for a second cousin to bring such an action to set aside an adoption for the deprivation of his right to a second cousin relationship with the adoptive child and on down the line, *ad infinitum*. It would soon become impossible to provide notices to all of the persons whose relationship will be severed by the adoption proceedings and thus, impossible to carry out any further adoptions whatsoever.

The Petitioners have continually attempted to depict themselves as *de facto* parents with long-time associations with these four unfortunate children. However, they concede that the natural mother and father of the four children resided for a temporary period of time in the home of the petitioner Amy Frances Ellis and that during that period of time, she caused the criminal proceedings to be brought against her adopted son, the natural father of these four children, for child neglect, which occurred in her home and one of the complaints was the condition of the home and as a result of the actions initiated by her, the children were made wards of the Putnam County Department of Public Welfare.

As the Petitioners admit in their statement of the case, the children were briefly returned to the natural parents, apparently on a trial basis, and this association was terminated when the mother abandoned the home and the father voluntarily turned the children over to the Petitioners and then disappeared himself. It is also conceded by the Petitioners that the children remained in the homes of the Petitioners for only 30 days and while there is no evidence in the record as to what the Welfare Department was doing for a period of 30 days, it is

submitted to this Court that it is certainly logical to assume that they spent that time looking for proper placements for these children so that they eventually would be put in a position where they would have the opportunity for growth and to become free and independent, well-developed men and women and citizens as this Court recommended in *Prince. Prince v. Massachusetts, supra.*

Clearly in this instance, the Respondents were merely following the dictates of the law and were acting in the best interests of the children which must be the Respondents' paramount concern. *Unwed Father v. Unwed Mother,* 379 N.E.2d 467, 472 (Ind. App. 1978).

CONCLUSION

For the reasons set forth above, the Court should not grant the Petition for a Writ of Certiorari, but rather should deny the same, sustain the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

J. D. Calbert, being duly sworn upon his oath says that he is one of the attorneys for the respondents Judge of the Putnam Circuit Court, Clerk of Putnam Circuit Court, Cecil Sutton, Helen Hurst, Donald Crosby, Rita Garrett and Janet Lane, as Members of Putnam County Department of Public Welfare, Gerald V. McCord, individually and as Director of the Putnam County Department of Public Welfare and Juanita Brooks, individually and as Child Welfare Worker, and that he deposited in the United States mail, postage prepaid and properly addressed three copies of Respondents' Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to Ralph Ogden and M. Anne Wilcox of the firm of Wilcox, Ogden & DuMond, 1122 Circle Tower Building, 5 East Market Street, Indianapolis, Indiana 46204 this 12 day of November, 1982.

J. D. Calbert

J.D. Calbert

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Before me, the undersigned Notary Public in and for and residing in said County and State, personally appeared J. D. Calbert, who acknowledged the execution of the foregoing Certificate of Service.

In Witness Whereof, I have hereunto subscribed my name and affixed my Official Seal this 12 day of November, 1982.

My Commission expires: Jan 13, 1984

Vera L Mikkelsen

Notary Public